STATE OF MICHIGAN

COURT OF APPEALS

KERR CORPORATION,

Plaintiff-Appellant,

v

WEISMAN, YOUNG, SCHLOSS & RUEMENAPP, P.C., and MARTIN C. WEISMAN,

Defendants-Appellees.

UNPUBLISHED
January 19, 2010

No. 282563
Oakland Circuit Court
LC No. 06-076864-CK

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendants' motion for summary disposition. We reverse.

In this legal malpractice action, plaintiff alleges that defendant Martin Weisman was negligent in the handling of a legal malpractice claim that plaintiff wished to assert against another attorney, Donald Van Suilichem, resulting from his alleged negligence in representing plaintiff in an employment discrimination case.

In August 1986, Shirley Franzel filed the employment discrimination case against Kerr in the Wayne Circuit Court. Franzel's complaint was filed against Kerr, as a *division* of Sybron Corporation,[1] and Rebecca Leinen, Kerr's Vice President of Human Resources. Van Suilichem timely filed a petition to remove the discrimination case federal district court, on the basis of diversity of citizenship jurisdiction, because he felt that federal court was a better forum from Kerr's perspective. The removal petition prepared by Van Suilichem was "borrowed" from previous litigation filed against Kerr (the Redley matter) when Kerr was still a division of Sybron, and asserted that Kerr was a Delaware corporation with its principal place of business in

[1] Franzel's complaint incorrectly identified Kerr as a division of Sybron, because in July 1986, just prior to the filing of the complaint, Kerr had been incorporated in its own right as a subsidiary of Kerr. Van Suilichem's firm provided legal services to Kerr in connection with Kerr's incorporation.

New Jersey. However, according to the record, Van Suilichem sent the petition to be signed by Leinen without conducting independent research as to whether Kerr's incorporation as a subsidiary of Sybron would affect its principal place of business, such that diversity jurisdiction in the Franzel litigation would be inapplicable. The case proceeded in federal court, and following a multi-week trial, the jury returned a verdict of no cause of action in favor of Kerr.

On appeal to the United States Court of Appeals for the Sixth Circuit, Franzel asserted, *inter alia*, that the federal district court lacked subject matter jurisdiction of the case, premised on the fact that Kerr, as a subsidiary of Sybron rather than a division, had its principal place of business in Michigan. The U.S. Court of Appeals remanded to the federal district court for a ruling on the jurisdiction issue. As it was apparent on remand that Kerr was a Michigan citizen at the time the removal petition was filed, the district court dismissed the case for lack of federal jurisdiction in 1992.

Franzel refiled her employment action in the Wayne Circuit Court in 1994, alleging claims for wrongful discharge and breach of contract. The jury returned a verdict of no cause of action in favor of Kerr on the wrongful discharge claim, but also found in favor of Franzel on the breach of contract claim. On appeal to this Court, we affirmed the judgment of no cause of action in favor of Kerr, and vacated the judgment against Kerr on the breach of contract claim and remanded for further proceedings because we concluded that Kerr, at best, owed only nominal damages to Franzel as a result of any breach. *Franzel v Kerr Mfg Co*, 234 Mich App 600; 600 NW2d 66 (1999). On remand, Franzel moved in the trial court for a new trial on her claims against Kerr, rather than a trial on the nominal damages owed on her breach of contract claim. The trial court denied the motion, and also awarded Kerr $300,000 in case evaluation sanctions. On appeal, this Court affirmed. *Franzel v Kerr Mfg Co*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2002 (Docket No. 230452).

After Franzel's action in the federal court was dismissed in 1992, Kerr's associate general counsel, Stephen Tomassi, began to discuss with Van Suilichem the basis for his removal of the action to federal court, and whether the associated costs and fees expended in defending an action that was ultimately dismissed for lack of subject matter jurisdiction were properly incurred. Kerr also hired defendants, Martin Weisman (Weisman) and his law firm, to sue Van Suilichem for legal malpractice in the removal of the Franzel action to federal court. Weisman and his firm commenced a legal malpractice action against Van Suilichem, and negotiated a tolling agreement with Van Suilichem's counsel wherein it was agreed that the running of the limitations period for the claim against Van Suilichem would toll until 30 days after the then ongoing Franzel case concluded.

Kerr contends that after the Franzel case concluded in 2003, Tomassi asked Weisman to resume the action against Van Suilichem. Weisman claims that he told Tomassi that he needed information from Kerr relative to the amount of damages to be asserted in the amended complaint, and that he did not hear from Tomassi, assumed the matter was concluded, and closed his file. Regardless, the limitations period for Kerr's claim against Van Suilichem expired. Kerr then commenced the instant legal malpractice action against defendants, seeking damages allegedly caused by defendants' failure to resume Kerr's lawsuit against Van Suilichem before the limitations period expired.

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(7), holding, as a matter of law, that the action was untimely under the two-year limitations period for legal malpractice. The trial court also granted summary disposition under subrule (C)(10), holding, as a matter of law, that Kerr did not establish a genuine issue of material fact as to causation because Van Suilichem would have successfully defended against the underlying claims of negligence on the basis that his decision to remove the Franzel litigation to federal court was protected by the attorney-judgment rule. This appeal ensued.

We first consider whether Kerr's action against defendants was timely commenced under the statute of limitations, and hold that the circuit court erred in concluding as a matter of law that it was not.

Summary dispositions are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006). Questions of law are reviewed de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007). "[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court also reviews de novo." *Wright v Rinaldo*, 279 Mich App 526, 533 n 3; 761 NW2d 114 (2008) (internal quotation marks and citation omitted).

The limitations period for a legal malpractice claim or action is two years from the date the claim accrued or arose, or within six months of the date that the plaintiff discovers or should have discovered the existence of the claim, whichever occurs later. MCL 600.5805(6); MCL 600.5838(2); *Wright, supra* at 529, citing *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006). Here, no issue is raised regarding the six-month discovery rule. Therefore, accrual must be analyzed. A legal malpractice claim accrues on the date the attorney "discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose . . . ." MCL 600.5838(1); *Wright, supra* at 528-529.

"Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court." *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002); *Wright, supra* at 534. But when a client hires a new attorney to handle the matter the previous attorney was handling, executes a document revoking the first attorney's power of attorney, gives a power of attorney to the new attorney, and conceals these actions from the first attorney, the client has effectively terminated the attorney-client relationship, as of the date of those actions, and the first attorney will be deemed to have discontinued serving the client under MCL 600.5838(1). *Wright, supra* at 529.

Here, there is conflicting evidence about whether Tomassi, on behalf of Kerr, severed the attorney-client relationship. On the one hand, defendants present evidence that Tomassi failed to respond to Weisman's request for information needed to amend the complaint against Van Suilichem. On the other hand, Tomassi did not hire a new attorney to resume the action against Van Suilichem, but instead, had told Weisman on several occasions that he wanted Weisman to pursue the action against Van Suilichem. Kerr also relies on the evidence that Weisman never notified it that he was withdrawing as its attorney, or that he considered the representation to have ended, but rather, Weisman sent Tomassi an email on September 10, 2004, asking Tomassi what, if anything, Kerr wanted him to do. This September 10, 2004, email by Weisman was sent less that two years before the commencement of this action.

Given the above evidence, we find that there is a genuine and material factual dispute as to when the claim against defendants accrued, and therefore, summary disposition under MCR 2.116(C)(7) was incorrectly granted. The trier of fact must decide the facts, before the trial court can decide whether the claim is time-barred. *Assemblers, Inc v American Manufacturers Mut Ins Co*, 281 Mich App 599, 606-607; 761 NW2d 399 (2008) (genuine issue of material fact as to whether work performed by construction company, which was a subcontractor on a public school construction project, was "in the performance of the contract," for purposes of a statute governing the limitations period for filing a claim under a public works payment bond, precluded summary disposition in the company's action against a surety that issued a general contractor's bond); *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 513; 739 NW2d 402, 407 (2007).

Kerr next contends that the trial court erred in holding, as a matter of law, that Kerr could not establish a causal link between Van Suilichem's alleged malpractice and Kerr's damages, and that Van Suilichem would have been able to successfully defend against the underlying claim against him because of the application of the attorney-judgment rule to the circumstances of his representation of Kerr in the Franzel matter. Kerr argues that the attorney-judgment rule would not have protected Van Suilichem's erroneous decision to remove the Franzel action from state to federal court. We conclude on this question as well that there are genuine issues of material fact as to whether the attorney-client judgment rule shields Van Suilichem from liability under the facts as presented in this record, and thus remand for further proceedings.

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship (i.e., duty), (2) negligence in the legal representation of the plaintiff (i.e., breach of duty), (3) that the alleged injury was a natural and direct result of the negligence (i.e., proximate causation), and (4) the fact and the extent of the injury. *Charles Reinhart Co v Winiemko,* 444 Mich 579, 585-586; 513 NW2d 773 (1994); *Kloian v Schwartz,* 272 Mich App 232, 240; 725 NW2d 671 (2006).

Proximate cause has two components: (1) cause-in-fact, and (2) proximate or legal cause. *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 218; 761 NW2d 293 (2008), citing *Craig v Oakwood Hosp,* 471 Mich 67, 86; 684 NW2d 296 (2004). Cause-in-fact requires plaintiff to show that *but for* (or, in Latin, "*sine qua, non*," meaning "without which, not") the defendants' actions, the injury in question would not have occurred. *Mettler Walloon LLC, supra* at 218, citing *Craig, supra* at 86-87. Legal or proximate cause, on the other hand, normally involves examining the foreseeability of consequences. *Id*.

"Hence, a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the 'suit within a suit' requirement in legal malpractice cases." *Manzo v Petrella,* 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co, supra* at 585-587.

The attorney-judgment rule recognizes that an attorney may make "mere errors in judgment," and still avoid malpractice liability, if the attorney acted in good faith, and demonstrated reasonable skill, care, discretion and judgment equivalent to that of the average practitioner, in performing the legal representation. *Simko v Blake,* 448 Mich 648, 655-658; 532 NW2d 842 (1995). Here, the alleged malpractice committed by Van Suilichem was the incorrect factual assertions contained in the petition for removal that plaintiff's principal place of business

was in Saddlebrook, New Jersey, and that Kerr was a division of Sybron, rather than a corporate subsidiary.[2] The petition for removal alleged that plaintiff was a Delaware corporation, which was true. However, the general rule is that "a 'subsidiary corporation which is incorporated as a separate entity from its parent corporation is considered to have its own principal place of business.'" *Schwartz v Electronic Data Systems, Inc*, 913 F2d 279, 283 (CA 6, 1990), quoting *Topp v CompAir Inc*, 814 F2d 830, 835 (CA 6, 1987). Thus, "[w]hen formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent." *Schwartz, supra* at 283. "'[E]ven if the parent corporation exerts a high degree of control through ownership or otherwise, and even if the separateness is perhaps only formal, the subsidiary's place of business is controlling for diversity purposes if the corporate separation is real and carefully maintained.'" *Schwartz, supra* at 283, quoting *USI Properties Corp v MD Constr Co*, 860 F2d 1, 7 (CA 1, 1988). In the context of this action, therefore, "even though [Kerr may have been] incorporated in Delaware or New Jersey, if its principal place of business [was] in Michigan, diversity [was] lacking, since [the Franzels were] citizens of Michigan." *Kerr v Franzel Mfg Co*, 959 F2d 628, 629 (CA 6, 1992).

The factual assertions that plaintiff was a Delaware Corporation and that plaintiff's principal place of business was in Saddlebrook, New Jersey, was verified by Leinen in an affidavit prepared by VanSuilichem.[3] As we previously noted, however, these affidavit assertions had been utilized in connection with the Redley removal petition that had been filed when Kerr was still a division of Sybron. We conclude, therefore, that there remains a genuine issue of material fact whether Van Suilichem demonstrated the reasonable skill, care, discretion and judgment equivalent to that of the average practitioner, *Simko, supra* at 655-658, when he utilized pleadings and tactics used in the previous Redley case as a basis for filing the removal petition in the Franzel matter and relied on the fact that Leinen signed the affidavit, rather than conducting independent research in order to become informed, or to otherwise appreciate that diversity jurisdiction would not apply, and removal to federal court as a strategy would be unavailable, given Kerr's incorporation as a subsidiary of Sybron. Stated differently, whether Van Suilichem's preparation of an affidavit with an incorrect factual assertion, sworn under oath to be true by Leinen, who may or may not have been a corporate officer, constitutes a "mere error in judgment" that is protected by the attorney-judgment rule, *Simko, supra,* is an issue to be presented to the fact finder for resolution.

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[2] Ironically, the caption of the petition correctly designated Kerr as a corporate subsidiary.

[3] Tomassi testified that Leinen was the vice president of human resources for Kerr. Defendant asserts that, therefore, Leinen was a corporate officer at the time she signed the affidavit. Tomassi further testified, however, that Leinen had no understanding of the difference between a subsidiary and a division, and since she was not a lawyer, did not understand that a separate legal analysis might have been undertaken concerning the removal petition. Plaintiff further contended during oral argument that in fact, Leinen was merely a locally-based human resources manager and not an officer of the corporation.

The trial court erred in granting summary disposition to defendants. Accordingly, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray